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No. 85-1640 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES M. DINEEN,
PETITIONER,

v.

MAINE BOARD OF OVERSEERS OF THE BAR,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MAINE

BRIEF IN OPPOSITION FOR THE RESPONDENT

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Statement of the Case

The Respondent incorporates by reference, Section I of the Maine Supreme Judicial Court's decision in the matter of *Board of Overseers of the Bar* v. *James M. Dineen*, at App. pp. 1a—5a of the petition, as the appropriate Statement of the Case in this matter.

Reasons For Denying the Writ

I. THE PETITIONER WAS NOT DENIED DUE PROCESS OF LAW WHEN THE STATE DISTRICT COURT JUDGE HEARD AND RULED UPON A MOTION TO COMPEL THE PETITIONER TO WITHDRAW.

The Petitioner contends that District Court Judge Roland A. Cole's hearing and ruling upon a motion for Petitioner's withdrawal, constituted a violation of the Petitioner's due process of law. This is simply not the case.

At no time did the Petitioner request that Judge Cole recuse himself from hearing or deciding the motion for Petitioner's withdrawal. Indeed, the Petitioner gave no testimony at the disciplinary hearing before the single justice, relating to his present claim of improper conduct by Judge Cole. The Petitioner made an indirect reference to the prior personal history between Judge Cole and himself, in the context of his Answer to the Information. However, even that Answer only refers to the Petitioner's request for Judge Cole not to be involved in matters in which the Petitioner appeared personally. The Petitioner's handling of the *Ganem* matter including the motion for his withdrawal, was not a matter involving the Petitioner on a personal basis. Therefore, there would have been no reason for Judge Cole to necessarily recuse himself from the *Ganem* matter, even if requested to do so. In fact, however, he was not requested to recuse himself. Thus, the Petitioner has raised no important question for the Court to consider on this issue, given the fact that he did not raise this issue before Judge Cole, and did not pursue it as an affirmative defense before the single justice. Additionally, this issue was not briefed or presented by the Petitioner upon his appeal to the Maine Law Court. See Appendix A to this brief. Having failed to preserve this issue, he may not now raise it for the first time. *Blanchette* v. *York Mut. Ins. Co.*, 455 A.2d 426, 428 (Me. 1983). *Cyr* v. *Cyr*, 432 A.2d 793, 797 (Me. 1981).

Finally, the Court should note that there was in fact "an impartial, disinterested judge" that did hear this matter, Justice Daniel Wathen. See petition p. 9.

II. NEITHER THE MAINE BAR RULES, NOR THE COURT'S ISSUANCE OF AN ORDER BASED THEREON, VIOLATE ANY PROVISION OF THE CONSTITUTION OF THE UNITED STATES.

Despite the Petitioner's indication that he filed his Petition based upon 28 U.S.C. § 1257(3), it is unclear whether in fact, jurisdiction is is properly based thereon.

That is, although the Petitioner bases the jurisdiction of this Court under Section 1257(3), he has failed to provide any authority or support for his position that the Maine Bar Rules, either as written or administered, in fact constitute a violation of the United States Constitution.

In fact, it is a settled principle, that the authority to define and regulate the practice of law naturally and logically belongs to the judicial department. See *Board of Overseers of the Bar* v. *Lee*, Me., 422 A.2d 990, 1002 (1980).

> "And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed. The power, however, is not an arbitrary and despotic one to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself." *In Re Secombe*, 60 U.S. (19 Howard) 9, 13 (1856).

The final responsibility in determining discipline to be imposed, rests with the state's highest court, and in determining the appropriate penalty the court may properly consider all facts and circumstances in their decision and litigation thereof. *In Re Neff*, 413 N.E.2d 1282, 1284 (1980).

The Maine Supreme Judicial Court, as part of its inherent powers, has the ultimate and exclusive responsibility for the structure and administration of disciplinary proceedings against lawyers. *People* v. *Susman*, Colo., 587 P.2d 782, 786 (1978); *Board of Overseers of the Bar* v. *Lee*, *supra*.

Thus, it is the inherent authority of the Maine court to promulgate and administer the disciplinary rules and sanctions. Petitioner has failed to present any facts or authority supporting his claim that the Maine court violated his due process of law by imposing a six-month suspension of his right to practice law in the State of Maine. Indeed, at the time of the issuance of Justice Wathen's Order of Suspension, the court was aware of the fact that the Petitioner had previously been suspended for a four-month period for similar conduct. App. p. 19a of the petition.

Finally, the Petitioner failed to make any of these constitutional arguments and claims to either the single justice, or to the Maine Law Court. Thus, they have not been properly preserved for this Court's consideration. *Cyr* v. *Cyr*, *supra*.

Conclusion

The Petition for Writ of Certiorari should be denied.

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APPENDIX A

STATE OF MAINE

SUPREME JUDICIAL COURT

Sitting As The Law Court

YORK, ss. LAW DOCKET No. YOR-85-56

BOARD OF OVERSEERS OF THE BAR,
PETITIONER-APPELLEE,

v.

JAMES MARTIN DINEEN,
RESPONDENT-APPELLANT.

ON APPEAL FROM A DECISION AND ORDER OF
JUSTICE DANIEL E. WATHEN

BRIEF OF RESPONDENT-APPELLANT JAMES MARTIN DINEEN

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Statement of Facts

Attorney James M. Dineen represented Charles F. Ganem in a continuum of matters beginning with Mr. Ganem's divorce from a former wife in 1974, and progressing through representation and advice on several other personal and business matters through the Summer of 1982.

Charles F. Ganem married Mary Judith Ganem in April of 1979. Between that time and the Summer of 1982, Mary Judith Ganem was well aware of the continuing professional relationship existing between her husband and James M. Dineen.

In the Summer of 1982, Charles F. Ganem arranged for James M. Dineen to represent Mary Judith Ganem on a civil O.U.I. charge which had been brought against her in the District Court in Kittery, Maine.

Attorney Dineen's preparation of Mrs. Ganem's defense on that charge included an interview with Mrs. Ganem in which Attorney Dineen inquired of Mrs. Ganem's activities only on the day of the arrest and as to how much if any alcohol she had consumed that day. Attorney Dineen did not inquire about, nor did Mrs. Ganem volunteer, any information about any past history concerning the use or abuse of alcohol. That matter went to trial in September of 1982, and Mrs. Ganem was adjudged to have committed the violation of civil O.U.I.

In the late summer or early autumn of 1982, Charles F. Ganem approached Attorney Dineen and asked him to represent him in what was then to be an uncontested divorce. Mr. and Mrs. Ganem had worked out all aspects of a property and child custody settlement between themselves, and Mr. Ganem, in Mrs. Ganem's company, came into Attorney Dineen's office for the purpose of having Attorney Dineen receive and write down the terms of the negotiated agreement arrived at independently beforehand between Mr. and Mrs. Ganem.

Mrs. Ganem was served with divorce papers. Later, Mr. Ganem took to Mrs. Ganem a typed version of the terms of their agreement. That type-written version had been prepared in Attorney Dineen's office.

After Mrs. Ganem's one appearance in Attorney Dineen's office in the company of her husband, Attorney Dineen did not again see her or hear from Mrs. Ganem until approximately December 22, 1982, at which time Mrs. Ganem advised Attorney Dineen that she was reconsidering the agreement she had signed and that she was considering retaining counsel to represent her in the divorce action. She asked Attorney Dineen if he would postpone or continue the uncontested divorce hearing that had been scheduled for hearing for the following day on Mr. Ganem's behalf. Attorney Dineen agreed and no hearing was had, nor was any rescheduled at that time.

A few weeks later, an attorney entered her appearance on behalf of Mrs. Ganem. Shortly thereafter, Mrs. Ganem's attorney filed a Motion with the Court seeking to compel the withdrawal of James M. Dineen's appearance on behalf of Charles F. Ganem. The reasons advanced by Mrs. Ganem's attorney in support of her Motion were that James M. Dineen was in a conflict of interest and the possession of adverse secret confidential information by James M. Dineen about Mrs. Ganem alleged to have been obtained during James M. Dineen's earlier representation of Mrs. Ganem on the referenced O.U.I. charge. Attorney Dineen denied then, and has continued to deny throughout, any conflict of interest and the gaining of any adverse, confidential information from Mrs. Ganem.

After hearing on the referenced Motion to Compel Withdrawal, Judge Roland Cole of the District Court granted that Motion, and he also filed a letter of complaint on the same subject about James M. Dineen with the Board of Overseers of the Bar. After hearing on Information before Justice Daniel E. Wathen, sitting as a Single Justice, James M. Dineen was ordered suspended from the practice of law for six months.

From that Judgment and Order, James M. Dineen, the Appellant-Respondent herein, has appealed to the Supreme Judicial Court, sitting as the Law Court.

Issues

The Issues presented to the Court for determination are:

I. Whether the Single Justice erred in his finding of violation of Maine Bar Rule 3.6(1) *Conduct During Representation, Preserving Confidences and Secrets*?

II. Whether the Single Justice erred in his finding of violation of Maine Bar Rules 3.4(a) and 3.4(b) *Acceptance of Employment, Disclosure of Interest and Conflict of Interest*?

III. Whether the Single Justice erred in his finding of violation of Maine Bar Rule 3.4(e) *Interest of Former Client*?

IV. Whether the Single Justice erred in his finding of violation of Maine Bar Rule 3.5(b)(2)(ii) *Withdrawal from Employment, Mandatory Withdrawal*?

Argument

I. THE SINGLE JUSTICE ERRED IN HIS FINDING OF VIOLATION OF MAINE BAR RULE 3.6(1) *Conduct During Representation, Preserving Confidences And Secrets.*

Mrs. Ganem was represented by the Respondent with regard to a civil O.U.I. charge and as a part of the preparation thereof, Mrs. Ganem advised the Respondent in fact of no alcoholic history or facts (T. 29, 6-13).

Mrs. Ganem in fact desired that such information as related to her alcoholic condition not be known (T. 77, 25; T. 78, 2-14; T. 29, 1-14).

Attorney Dineen did not receive from Mrs. Ganem any information of the alcoholic situation of Mrs. Ganem (T. 99, 1-4; T. 104, 1-25; T. 105, 1-25).

The Judge hearing the Motion for Disqualification assumed without factual basis that Attorney Dineen had some idea of Mrs. Ganem's alcoholic history (T. 60, 1-25; T. 61, 1-9). There is no evidence to support the assumption that Attorney Dineen was aware of any alcoholic history other than those facts which were given him by Mrs. Ganem at the time of preparation for hearing on a civil O.U.I. complaint. In fact, the history of Mrs. Ganem's Seton Unit visitation was not communicated to Attorney Dineen until January of 1983 (T. 57, 4-24), and such information was communicated to Attorney Dineen after the O.U.I. complaint had been disposed of (T. 78, 2-14).

Attorney Dineen learned only from *Mr.* Ganem of Mrs. Ganem's alcoholic problems and that information was not received for the *first* time by Attorney Dineen until January of 1983, *after* Mrs. Ganem had engaged counsel, who then entered her appearance on behalf of Mrs. Ganem. (T. 83, 3-13; T. 101, 25; T. 102, 1-8).

Accordingly, the finding of a violation of Maine Bar Rule 3.6(1) is not supported by any facts in the record with regard to the breaching of any confidences so as to constitute a disadvantage to Mrs. Ganem.

II. The Single Justice Erred In His Finding Of Violation Of Maine Bar Rules 3.4(a) And 3.4(b) *Acceptance Of Employment, Disclosure Of Interest* And *Conflict Of Interest.*

Mrs. Ganem was aware of the representation of Mr. Dineen on various matters of Mr. Ganem prior to Mr. Dineen's representation of Mrs. Ganem on the charge brought against her for Operating While Under the Influence of Intoxicating Liquor—Civil (T. 27, 14-25).

There is evidence that Mr. and Mrs. Ganem had sought a so-called uncontested divorce and that Attorney Dineen did not participate in the negotiations or discussions which led to the property and custody agreement which was placed in typewritten form by Attorney Dineen's office.

There is no evidence that Mrs. Ganem did at any time rely upon advice of Attorney Dineen in the property-custody settlement which was placed in typewritten form in Attorney Dineen's office. (T. 72, 8-25). In fact, Attorney Dineen advised the parties of his limited representation of Mr. Ganem and only upon the condition of agreement of the parties to the same. (T. 12, 18-25; T. 13, 1-15; T. 35, 1-16).

It is respectfully submitted that Mrs. Ganem was aware of Attorney Dineen's representation of Mr. Ganem and acquiesced in such representation as permitted by Maine Bar Rule 3.4(d), and that Attorney Dineen's representation was such that no indication appeared to warrant a conclusion of representation of differing interests in the representation of Mr. Ganem.

III. The Single Justice Erred In His Finding Of Violation Of Maine Bar Rule 3.4(e) *Interest Of Former Client.*

There is no evidence to warrant a finding that Attorney Dineen knew of any facts that would lead to a violation of Maine Bar Rule 3.4(e).

At the time of hearing before the District Court Judge on the Motion to Compel Withdrawal of the Appearance of James M. Dineen, it become abundantly clear that any information which Attorney Dineen had gained of Mrs. Ganem's possible alcohol problem was acquired in January of 1983, long after the September, 1982 conclusion of proceedings in Mrs. Ganem's O.U.I. matter. Such information of Mrs. Ganem's condition was not communicated to Attorney Dineen (T. 78, 2-14).

There is no factual basis to justify any inference that Attorney Dineen's representation of Mr. Ganem would create a situation in which information of the previous representation of Mrs. Ganem would be related to the divorce action or otherwise result in any breach of confidence as a result thereof.

IV. THE SINGLE JUSTICE ERRED IN HIS FINDING OF VIOLATION OF MAINE BAR RULE 3.5(b)(2)(ii) *Withdrawal From Employment, Mandatory Withdrawal.*

Because, as previously argued, there is no evidence that Attorney Dineen had received any information from Mrs. Ganem through his prior representation of her in the O.U.I. matter which would be in any way related to the divorce proceedings or be grounds therefor, there was nothing that Attorney Dineen knew, or should have known, to indicate that his continued employment would result in a violation of the Maine Bar Rules.

Since nothing in the evidence supports the position that Attorney Dineen gained any adverse, confidential information from Mrs. Ganem in representing her on an O.U.I. matter which he could use or did use against her in the subsequent divorce proceedings, the Court could not reasonably find that Attorney Dineen should have withdrawn as Mr. Ganem's counsel.

In conclusion, the Appellant herein argues that the record fails to show that Attorney Dineen violated any of the Maine Bar Rules as alleged, or any other Maine Bar Rules; therefore, the adverse judgment rendered against him by the Single Justice should be reversed.

Addendum

Maine Bar Rule 3.6(1) *Conduct During Representation, Preserving Confidences and Secrets:*

(1) Except as permitted by these rules or as required by law or order of court, a lawyer shall not, without the informed written consent of the client, knowingly reveal a confidence or secret of his client; use such a confidence or secret to the disadvantage of his client; or use such confidence or secret to the advantage of himself or a third person.

(2) A lawyer shall exercise reasonable care to prevent his partners, employees, associates, and others whose services are utilized by him from improperly disclosing or using confidences or secrets of a client.

(3) This provision is not violated by the disclosure of confidences or secrets by a lawyer as necessary to the defense of himself, his partners, employees, or associates against an accusation of wrongful conduct, in a judiciary proceeding including, but not limited to, any grievance proceeding under these rules.

(4) This provision is not violated by the disclosure of a client's intention to commit a crime or the information necessary to prevent the crime or to avoid subjecting others to risk of harm.

(5) As used in Rule 3.6(1) "confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested by held inviolate or the disclosure of which would be embarrassing or detrimental to the client.

Maine Bar Rule 3.4(a) *Acceptance of Employment, Disclosure of Interest:*

> Before accepting any professional employment a lawyer shall disclose to the prospective client his relationship, if any, with the adverse party; his interest, if any, in the subject matter of the employment; all the circumstances regarding his relationship to the parties; and any interest or connection with the matter at hand that a lawyer knows or reasonably should know would influence the client in the selection of a lawyer.

Maine Bar Rule 3.4(b) *Acceptance of Employment, Conflict of Interest:*

> A lawyer should not accept employment if the exercise of his independent professional judgment in behalf of a client will be, or is likely to be, adversely affected by the acceptance of such employment, or if it would be likely to involve him in representing differing interests, except to the extent such employment is permitted by subdivision (d) of this rule.

Maine Bar Rule 3.4(d) Acceptance of Employment, Multiple Employment Permitted:

> A lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each.

Maine Bar Rule 3.4(e) *Acceptance of Employment, Interest of Former Client:*

> A lawyer shall not accept employment adverse to a former client without that client's informed written consent if such new employment involves the subject matter of former employment or may involve the use of confidential information obtained through such former employment.

Maine Bar Rule 3.5(b)(2)(ii) *Withdrawal from Employment, Mandatory Withdrawal:*

> (2) A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if:
> (ii) He knows, or should know, that his continued employment will result in a violation of these Rules;

CERTIFICATE OF SERVICE

I, James Martin Dineen, Respondent-Appellant *Pro Se* in the foregoing matter, do hereby certify that I have this day caused service of two (2) copies of the within brief and one (1) copy of the accompanying appendix to be made upon the Petitioner-Appellee, Board of Overseers of the Bar, by mailing same to Petitioner's attorney, J. Scott Davis, Esq., addressed to him at P.O. Box 1820, Augusta, Maine 04330.

Dated at Kittery, Maine, this twenty-first day of June, 1985.

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Respondent-Appellant Pro Se

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